No. 82-1721

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE SEATTLE TIMES COMPANY, a Delaware corporation, d/b/a THE SEATTLE TIMES; WALLA WALLA UNION-BULLETIN, INC.; ERIK LACITIS AND JANE DOE LACITIS; JOHN WILSON and REBECCA WILSON; JOHN MCCOY and KAREN MCCOY,

Petitioners,

v.

KEITH MILTON RHINEHART, a single person; the AQUARIAN FOUNDATION, a Washington not-for-profit corporation; KATHI BAILEY, a married person, LILLIAN YOUNG, a married person, TONI STRAUCH, a married person, SYLVIA CORWIN, and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Washington

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REPLY BRIEF FOR THE PETITIONERS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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SUMMARY OF ARGUMENT

Respondents are unable to justify the Protective Order on the grounds which the Washington courts adopted. Instead, they have tried to revive a waiver theory which they had abandoned in the trial court and which the state courts consistently rejected as a matter of state law. The record does not support respondents' contention that this order arose by stipulation of the parties.[1]

[1] The Brief for the Petitioners is abbreviated as "Pet. Br." and the Brief of the Respondents as "Resp. Br." The format for citations to the record in this Brief follows that heretofore adopted by the parties. *See* Pet. Br. 2 n.1; Resp. Br. 2 n.2. In addition, petitioners respectfully call the Court's attention to their Petition for a Writ of Certiorari, at 3 n.1 (filed April 22, 1983), for the disclosure required by Sup. Ct. R. 28.1. Blethen Corp., a privately-held corporation, owns 50.5 percent of the common voting stock of the Seattle Times Co. and Ridder Publications, Inc., which is an affiliate of Knight-Ridder Newspapers, Inc., a publicly-held corporations, owns the remaining 49.5 percent. Walla Walla Union-Bulletin, Inc., is a wholly-owned subsidiary of Times Communications Co., which is wholly-owned by the Seattle Times Co.

The other arguments respondents offer are grounded in claims that their constitutional rights of religion, association, and privacy were violated. These claims were not the basis for the order. The issue before this Court is whether the conjectural grounds which the Washington courts adopted, without findings, are constitutionally adequate to support the issuance of the Protective Order.

Although they do not dispute the First Amendment test which petitioners have proposed, respondents argue that this Court need not inquire too closely into the reasons which the Washington courts advance to justify the ban on publication. Respondents' suggestion that findings are not required or that a court need not closely scrutinize justifications in support of restrictions upon expression finds no support in the governing case law.

The order directly restricts expression and chills the exercise of First Amendment rights. Yet it advances no compelling governmental interest. Neither the rationale the Washington courts adopted nor the various constitutional arguments suggested by respondents adequately support the order.

ARGUMENT

I. PETITIONERS DID NOT STIPULATE TO ENTRY OF THIS PROTECTIVE ORDER.

A. Respondents Abandoned Their Waiver Argument and the State Courts Did Not Adopt It.

Respondents argue (Resp. Br. 4-6, 16-17) that the Seattle Times waived its constitutional rights and stipulated to entry of the order. Although respondents highlight this as their leading argument, the record offers them no support.[2]

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[2] Respondents' position is premised exclusively upon some remarks contained in a deposition (Resp. Br. 5-6) that is not part of the record. This Court has repeatedly held that it can act only on the record of the court below. *See Standard-Vacuum Oil Co. v. United States*, 339 U.S. 157, 160 (1950); *Clark v. Pennsylvania*, 128 U.S. 395, 397 (1888); *Davis v. Packard*, 31 U.S. (6 Pet.) 41, 48-50 (1832). Moreover, the Protective Order indicates (JA 64a) that

When respondents initially presented this waiver argument in January 1981 (SSCP 125-141, CP 282-303), the trial court denied their request for a protective order (JA 78a-79a). When they sought reconsideration, they dropped the waiver argument entirely (SSCP 95-104). Respondents later renewed the argument in their briefs to the Washington Supreme Court. It was again rejected.

Respondents cannot now ask this Court to overrule Washington courts on an issue of state procedure that is exclusively within the competence of the state court. This Court cannot resurrect state law arguments that the courts below rejected. *See Michigan National Bank v. Robertson*, 372 U.S. 591, 594 (1963); *Shoener v. Pennsylvania*, 207 U.S. 188, 195 (1907). Respondents' waiver argument, which they had abandoned in the trial court and which did not form the basis for the order, is not properly before this Court.[3]

B. The Order Does Not Purport to Enforce a "Stipulation."

Although respondents now seek to characterize the Protective Order as the product of stipulation, the record reveals a far different sequence of events. Respondents sought a broad order "covering all information obtained through discovery which is not otherwise public." (SSCP 95.) This sweeping request bore no relationship

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the trial court neither reviewed nor relied upon the deposition in formulating the order.

[3] Most courts have recognized that they will infer such waivers only in "clear and compelling" circumstances. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967); *In re Halkin*, 598 F.2d 176, 189 (D.C. Cir. 1979). As the Third Circuit noted in *Rodgers v. United States Steel Corp.*, 536 F.2d 1001, 1007 n.14 (3d Cir. 1976), waiver "will not be lightly inferred and every reasonable presumption against waiver must be indulged." Even where there is an express stipulation, the Sixth Circuit has held that any such waiver must be "narrowly construed." *Nat'l Polymer Prods., Inc. v. Borg-Warner Corp.*, 641 F.2d 418, 423-24 (6th Cir. 1981).

to the purported "stipulation." Nowhere did respondents argue that the Seattle Times had already stipulated to the entry of such an order (SSCP 88-104). Petitioners opposed entry of the order, arguing that the court must give adequate weight to First Amendment considerations (CP 212-225).

The trial court thereafter issued its memorandum opinion, ruling that any First Amendment limitation upon the scope of protective orders "could have a chilling effect on a party's willingness to bring his case to court." (JA 54a.) The Washington Supreme Court affirmed. The constitutionality of the order must be tested against those reasons. *See Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101-04 (1981) (federal court order limiting communications by litigants must be based on "clear record and specific findings" that establish "likelihood of serious abuses"). The courts did not rely upon the stipulation rationale or any of the other grounds which respondents now press.[4]

The purported "stipulation" in fact never reached fruition. It died on the vine of respondents' repeated refusals to cooperate with pretrial discovery. Respondents incorrectly assert that "the plaintiffs produced for the defendants documents which literally filled an entire room." (Resp. Br. 6.) The Seattle Times has not yet obtained any significant document discovery. As petitioners argued (CP 304-324, 344-364), and as the trial court determined (JA 77a-78a), respondents aborted

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[4] Respondents' waiver argument is deficient in other respects. The Protective Order (JA 64a-65a), by its terms, is far broader than the alleged "stipulation." It is not limited to financial information obtained from Rhinehart or the Aquarian Foundation, which respondents argue (Resp. Br. 5-6) was the substance of the so-called "stipulation." It covers not only financial information about Rhinehart and the Foundation, but also financial information relating to any of the respondents and the identity and address of any past or present Foundation members, contributors, donors, and clients.

document discovery when they refused to permit inspection and copying of Aquarian documents.

The only documents respondents produced which related to Rhinehart's or the Foundation's financial affairs, moreover, were copies of Rhinehart's tax returns which respondents, not the Seattle Times, placed in the *public files*. They were not required to deposit the discovery materials in a public file. Nevertheless, they did so, and the tax returns became public records in the trial court, the Washington Supreme Court, and now in the Clerk's office of this Court (CP 602-670). The voluntary act of placing this material in public files obviously undercuts any argument that respondents produced such financial data in reliance upon a stipulation between counsel. At this point, only petitioners are denied the right to disseminate or discuss this information, which is available to the rest of the media.

II. THE WASHINGTON COURTS DID NOT ISSUE THE ORDER FOR THE REASONS RESPONDENTS ADVANCE.

A. The State Courts Sought to Promote and Encourage Civil Litigation.

Respondents do not defend the rationale the Washington courts adopted. They argue instead that the trial court entered the order to protect respondents' constitutional rights of religion, association, and privacy, because they contend that any discovery into the factual basis of their claims would be unconstitutional (Resp. Br. 17-34). In making this argument, however, respondents ignore the trial court's memorandum opinion (JA 51a-54a), which clearly explained the court's reasons for entering the order. Respondents speculate (Resp. Br. 11 n.5) about the court's decision to excise from its order (JA 64a) respondents' proposed language relating to their rights of association, religion, and privacy. They also distort (Resp. Br. 21, 33) the reasoning of the Washington Supreme Court to accommodate their con-

stitutional argument and attempt to reargue (Resp. Br. 17-21) legal issues from another case now pending before this Court on a separate petition for certiorari.[5]

The Washington courts stated the reasons for the order. The justification for the order appears in the trial court's opinion (JA 51a-54a) and in the decision of the Washington Supreme Court upholding the order (JA 100a-149a). Both courts imposed the order to promote and encourage civil litigation because they believed that not to do so might inhibit the use of the judicial process as a forum for resolving disputes. Respondents thus completely misrepresent both the intent and the substance of the order when they assert (Resp. Br. 17) that it was "devised to protect the First Amendment rights of Reverend Rhinehart and the members and donors of the Aquarian Foundation."

B. The Order Is Not Supported by Adequate Findings.

Petitioners have argued (Pet. Br. 34-39) that a court must base such an order upon specific and detailed find-

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[5] Petitioners do not believe that it is appropriate to respond once again to the legal arguments (Resp. Br. 17-34) relating to whether respondents have a constitutional right to press an action for damages caused by loss of Foundation membership and public financial support while simultaneously refusing any discovery into the basis of the claim. Respondents' entire argument that the Protective Order is constitutionally mandated is premised upon the assumption that pretrial discovery in this case violates the Constitution. That issue is the subject of a separate petition for certiorari and is adequately discussed elsewhere. *See generally* Brief in Opposition to Cross-Petition for Writ of Certiorari, *Rhinehart v. The Seattle Times*, at 13-20 (U.S. No. 82-1758, filed May 31, 1983). Contrary to respondents' assertions (Resp. Br. 22-25), there is no "collision" of First Amendment rights because "[e]very person who brings a lawsuit under our system of jurisprudence must bear disclosure of those facts upon which his claim is based." *Caesar v. Mountanos*, 542 F.2d 1064, 1068 (9th Cir. 1976), *cert. denied*, 430 U.S. 954 (1977). *See also Anderson v. Nixon*, 444 F. Supp. 1195, 1199-1200 (D.D.C. 1978). Respondents are not bystanders to their lawsuit. The matters covered by the Protective Order constitute evidence directly relating to the tort claims in their complaint.

ings, while respondents contend that findings are not required because all facts were "undisputed and findings of fact would be superfluous." (Resp. Br. 29.) Respondents' argument undermines itself. The courts below, in their written opinions, expressly stated that petitioners' First Amendment rights could be overridden for the general goals of facilitating pretrial discovery and encouraging access to the courts. Neither court indicated that it was imposing the order to protect respondents' rights of religion, association, and privacy. In *Gulf Oil*, 452 U.S. at 101, this Court required federal courts to provide "a clear record and specific findings" before imposing a communications ban on litigants. Respondents' disingenuous characterization of the Protective Order on appeal makes it abundantly clear why this rule is not only prudent but necessary.[6]

Respondents fail to grasp that the very reason that courts are required to make findings is to frame and limit the issues that may be addressed on appeal and ensure that any intrusion upon First Amendment values is necessary and is supported by substantial findings. *See Press-Enterprise Co. v. Superior Court*, No. 82-556, slip op. at 8 (U.S. Jan. 18, 1984) (findings necessary to close criminal *voir dire* must be "specific enough that a reviewing court can determine whether the closure order was properly entered"); *Gulf Oil*, 452 U.S. at 102 ("weighing of competing factors" necessary to provide "record useful for appellate review"). Whether the Aquarians are a "traditional mainstream denomination"

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[6] It is difficult to see how the order, which is directed against a private party, is designed to advance respondents' constitutional rights of religion, association, or privacy. If, as respondents argue (Resp. Br. 28, 33 n.10), the order lasts only until time of trial or until dispositive motions are submitted, *see Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982), *cert. denied sub nom., Citytrust v. Joy*, 103 S. Ct. 1498, 75 L. Ed. 2d 930 (1983), the order has no lasting impact. Because this material will be publicized in any event, as respondents have built their case upon it, there is no constitutional justification for a temporary prior restraint.

or whether their tenets are "well-received by the population at large" (Resp. Br. 29-30) are questions that the Washington courts did not address (JA 129a) and are not now before this Court. Even if the Establishment Clause were read to permit courts to restrict free expression in order to protect self-proclaimed "minority" religions from adverse publicity, it would not reduce the need for rigorous analysis and specific findings before a court issues a pretrial order which limits the exercise of others' First Amendment rights.[7]

The constitutionality of the order cannot turn on whether a Molotov cocktail was once hurled through the window at Foundation headquarters or whether two men once set upon an elderly woman near the Foundation's offices (Resp. Br. 30). Respondents have not sought to enjoin these activities and the order in question is not directed against their perpetrators. The record is devoid of anything but conclusory assertions that the newspapers were in any way linked to those incidents and the trial court properly did not rely upon respondents' affidavits.[8]

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[7] Spiritualism has long been active and has enjoyed periodic bouts of popularity in America. Since 1848, spiritualists have obtained many converts and have repeatedly been exposed by critics: "Today, of course, produces its own crop of supernormalities over which debate rages as fiercely as ever, together with its new generations of debunkers. Charlatans are unmasked as regularly and unavailingly as ever they were. As with those other 'miracles', the show goes on regardless. Passions run as high as ever they did. The spirits are willing, and the flesh is weak." R. Brandon, *The Spiritualists: The Passion for the Occult in the Nineteenth and Twentieth Centuries* 254 (1983).

[8] The articles complained of were published in April 1973, February, March, and April 1978, and November 1979 (JA 4a). Although respondents declare that the assertions in their complaint must be accepted as true and claim that the Seattle Times has shown "consistent callous disregard for physical safety and psychological well-being" of the Aquarians (Resp. Br. 2, 29), a review of the excerpts attached to their complaint (JA 20a-29a) shows no incitement or even attempted incitement. Respondents' strident assertions of some causal link between the publications and the random

Freedom of expression may not be curtailed or punished because of "assertion and conjecture." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841 (1978). Just as the rationale that the Washington courts gave for issuing the order is nothing more than speculation that some future litigants might be deterred from resorting to the judicial process to resolve disputes, the rationale that respondents *imagine* the courts gave is equally speculative and conjectural.

III. THE APPROPRIATE CONSTITUTIONAL TEST MUST RECOGNIZE PETITIONERS' FIRST AMENDMENT INTERESTS.

A. Respondents Do Not Challenge the First Amendment Test Petitioners Propose.

Respondents agree with petitioners that "[t]he factors to apply in balancing the interests for and against a protective order should be drawn from this Court's prior restraint cases." (Resp. Br. 26.) Respondents also rely upon the requirements identified in *In re Halkin*, 598 F.2d 176, 191 (D.C. Cir. 1979), and note that the First Circuit in *In re San Juan Star Co.*, 662 F.2d 108, 116 (1st Cir. 1981), identified similar factors (Resp. Br. 27). Instead of challenging the constitutional test petitioners propose, respondents claim (Resp. Br. 27-34) that the

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incidents of urban violence catalogued in their affidavits (JA 40a-41a,, 43a, 45a-46a, 48a, 83a, 92a, 97a-98a) are typical examples of *post hoc, ergo propter hoc* reasoning. The two incidents which respondents attempt to connect to the Seattle Times, the receipt by Marilou McIntyre in June 1979 of a 15-month old news clipping about Rhinehart (JA 49a-50a, 55a-57a) and some shouting by three men on a Seattle street in November 1980, a year after the last article had appeared in the newspaper (JA 46a-48a), hardly support respondents' contention that petitioners have sought "to quench [the Aquarians'] small flame of faith" or to attack the "Maginot Line" which Rhinehart has built around his financial sources (Resp. Br. 21, 27).

Protective Order met the *Halkin* test and that the courts below adopted the *Halkin* and *San Juan Star* criteria.[9]

The record does not support respondents' position. In issuing its memorandum opinion granting plaintiffs' motion for a protective order, the trial court distinguished *Halkin* (JA 53a-54a) and concluded that a ban on publication would issue when the party seeking the restriction on publication merely "has a reasonable basis for its request" or has "reasonable grounds for the issuance for such an order." (JA 52a-53a.) The court did not purport to apply the *San Juan Star* formula, which the First Circuit had not yet devised. The Washington Supreme Court expressly repudiated both the *Halkin* and the *San Juan Star* standards (JA 130a).

B. Respondents Incorrectly Assume That Discussion of Information Learned in Pretrial Proceedings Is Presumptively Wrongful.

Respondents assert that any information uncovered during the course of pretrial proceedings is presumptively secret (Resp. Br. 38-43), even though they purportedly accept the First Amendment test which petitioners have proposed. Therefore, they contend, the Constitution requires no balancing test, no scrutiny of the need for such

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[9] Rhinehart asks this Court to apply the *Halkin* standards under a balancing test (Resp. Br. 25-34), apparently implying that petitioners do not. However, both *Halkin* and *San Juan Star* have articulated tests designed to weigh the harm posed by publication with the First Amendment interests at stake. Petitioners have proposed a similar test (Pet. Br. 39-45) to accommodate their First Amendment interests with the governmental interest in protective orders. The primary dispute is whether the Court should closely scrutinize the justifications advanced. Even an order that protects a "vital constitutional guarantee" must be closely scrutinized. *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 570 (1976). *See also Press-Enterprise Co. v. Superior Court*, slip op. at 8-11 (closure of *voir dire* to protect Sixth Amendment and privacy interests). Rhinehart offers no basis for this Court to break with precedent and decline to apply traditional strict scrutiny.

orders, and no presumption against their use (Resp. Br. 43-46). Respondents' position on this important policy matter is based upon a constricted view of the multiple purposes and uses of civil litigation and upon a fundamental misreading of the Judiciary Act of 1789, Chapter XX, 30, 1 Stat. 88-89, and of the Publicity in Taking Evidence Act of 1913, 15 U.S.C. § 30 (1973).[10]

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[10] Thus, respondents assert (Resp. Br. 42) that the First Congress created a "right of privacy in depositions" in the Judiciary Act of 1789 when it provided a means whereby depositions would be sealed prior to trial. They then argue that, because it was also proposed by Congress in 1789, the First Amendment cannot extend to use of information received during pretrial depositions. *See Times Newspapers Ltd. (of Great Britain) v. McDonnell Douglas Corp.*, 387 F. Supp. 189, 195 (C.D. Cal. 1974). The argument is built from several misconceptions. The fact that the Judiciary Act of 1789 permits a practice does not automatically render it constitutional. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (holding portions of Judiciary Act of 1789 unconstitutional). More important, the sealing of a deposition, like the alternative statutory method of hand delivery by the magistrate before whom the deposition was taken, was based upon evidentiary requirements, in order to provide authentication and to establish a chain of custody. *See Beale v. Thompson*, 12 U.S. (8 Cranch) 70 (1814); *Louis Werner Stave Co. v. Marden, Orth & Hastings Co.*, 280 F. 601, 604-05 (2d Cir. 1922); *Shankwiker v. Reading*, 21 F. Cas. 1163 (C.C.D. Mich. 1847) (No. 12,704). Even today the law of evidence requires that public documents be under seal, *see, e.g.*, Fed. R. Evid. 902(1), yet no one would argue that this makes them presumptively secret. Respondents apparently confuse this evidentiary function with their privacy theory.

Similarly, respondents' discussion (Resp. Br. 42-43) of the congressional response to *United States v. United Shoe Mach. Co.*, 198 F. 870 (D. Mass. 1912), completely misses the point. Congress sought to overturn a specific holding that limited public attendance at antitrust depositions. A litigant's right to publish or discuss information uncovered during civil discovery was not at issue. Although some members preferred a bill to prevent the taking of any depositions in secret, *see* 49 Cong. Rec. 2511 (1913) (remarks of Mr. Mann), Congress made a pragmatic decision to deal only with the case at hand because, as Representative Norris observed, "if we should come in here with a general act there would be a dozen objections, and one would be that there might be some case where

In support of their position, moreover, respondents argue that "[d]iscovery simply cannot function without protective orders" (Resp. Br. 44) and imply (Resp. Br. 35-36) that petitioners dispute any judicial authority to control pretrial confidentiality. Petitioners recognize that the government may have an interest in limiting dissemination of discovery materials, particularly information that is not relevant to the matters at issue or is not likely to become part of the case record. *See Tavoulareas v. Washington Post Co.*, No. 83-1688 (D.C. Cir. Jan. 6, 1984). Petitioners oppose respondents' position that courts should routinely exact broad First Amendment waivers as the price for defending defamation or other claims without any detailed showing by the proponent of secrecy. *See Press-Enterprise Co. v. Superior Court*, slip op. at 7 (criminal proceedings are presumptively open and closure permitted "only for cause shown that outweighs the value of openness").

This Court should reject respondents' weakened First Amendment analysis. Litigation as an instrument of conflict resolution, increasingly widespread and complex, is too central to the operation of a free society to permit the routine adoption of a communication ban that would preclude the public from learning about the litigation. Respondents' proposed rule, if widely adopted, would destroy the vital role of civil litigation in "communicating useful information to the public." *In re Primus*, 436 U.S. 412, 431 (1978).

Contrary to respondents' argument (Resp. Br. 36-38), the ability to defend oneself by means of subpoenas and other civil discovery tools is a valuable government benefit, which may not be conditioned upon waiver of constitutional rights. In *Gulf Oil*, for example, this Court did not suggest that the benefits of the class action device permitted courts to require routine waivers by class coun-

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the testimony was immoral and indecent and where the court ought to have a right to make it secret." 49 Cong. Rec. 2513 (1913).

sel of their rights to communicate with prospective class members. Moreover, just as the state's concerns for the integrity of its electoral or referendum processes do not require participants to abandon the protections of the First Amendment, *Brown v. Hartlage*, 456 U.S. 45, 52-53 (1982); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 788-92 (1978), participants, even involuntary ones, in the judicial process must be entitled to similar protections.[11]

IV. THE ORDER DOES NOT SATISFY BASIC CONSTITUTIONAL REQUIREMENTS.

A. The Order Infringes Upon the Exercise of First Amendment Rights.

Despite respondents' assertions to the contrary (Resp. Br. 36-38), an order which limits publication, dissemination, and use of knowledge diminishes "meaningful" First Amendment rights. In the absence of a protective order or other prior restraint, the Seattle Times and the Walla Walla Union-Bulletin are free to print anything they learn from any source. With entry of the order, they are now limited in what they can print, subject to constant

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[11] A recent decision has declined to recognize any First Amendment interest in publicizing information obtained in pretrial discovery. *Tavoulareas v. Washington Post Co.*, slip op. at 32-40. In adopting a weakened constitutional standard, the court relied upon *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam), and *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), and reasoned that private parties involved in civil litigation can be treated as though they were government agents or employees with correspondingly limited rights of expression. Its conclusion, like that adopted by the Washington Supreme Court (JA 111a-113a), rests upon a flawed analogy. Private litigants do not become agents of the state when they are brought into civil litigation. When a newspaper becomes involved in covering elections, a process over which the state has extensive powers of regulation, the government cannot dictate the choice of material to go into a newspaper. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256-58 (1974). Nor can the newspaper's independent status be ignored or compromised simply because respondents have sued it.

governmental supervision designed to monitor the scope of their publications and the source of their information, forced to establish "to the satisfaction of the court . . . a truly independent source" (SSCP 127) for any publications about Rhinehart, and fearful of any misstep that would bring down judicial sanctions for any unwitting "use" of information which emerges in civil discovery. *See Gulf Oil*, 452 U.S. at 103 n.17 (forcing litigants and counsel "to defend their good faith, at the risk of a contempt citation," can aggravate restriction on speech); *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 390 (1973) (dangers of restraint include indirect "suppression of speech . . . by inducing excessive caution in the speaker"). *See also Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257 (1974).

Nor can the fact that the newspapers may obtain information as a consequence of a lawsuit filed against them lead to the conclusion that their First Amendment rights are no longer "meaningful." Respondents' argument assumes that governmental control of the flow of information creates an exception to long-established First Amendment case law by permitting a court to abridge expression without any scrutiny of the justification advanced. Even where sensitive or confidential information is provided by government, the newspapers are presumptively free to publish without government intrusion. *See Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103-04 (1979). *See also Press-Enterprise Co. v. Superior Court*, slip op. at 8-11 (names of jurors); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977) (per curiam) (names of juvenile offenders); *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976) (pretrial confessions and names of victims). The growth of modern government should not lead ineluctably to the loss of constitutional protections designed to limit governmental power.[12]

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[12] Despite this Court's decisions in *Gulf Oil*, *Smith v. Daily Mail*, *Oklahoma Publishing*, and *Nebraska Press*, the court in *Tavoulareas*

By placing deliberate handicaps upon investigative reporting, the order reaches even further. It not only restricts publication or dissemination but also outlaws any "use" of information learned as a result of Rhinehart's lawsuit "other than such use as is necessary in order . . . to prepare and try the case." (JA 65a.) The order as applied requires editors or reporters who sift and weigh information about Rhinehart, even if it has been acquired from third parties, to compartmentalize their minds and ignore what they have learned as a result of litigation.

For example, petitioners have already received significant information about the personal margin account that Rhinehart maintains at Merrill Lynch, Pierce, Fenner & Smith, Inc., using funds which petitioners believe he obtained from his followers (CP 132-135). Because this information corroborates the allegedly defamatory publications, it will almost certainly emerge on a motion for summary judgment and at trial. In the meantime, however, the newspapers may not consider what they know in undertaking further articles about Rhinehart's wealth or the allegedly fraudulent financial practices that respondents have made the focus of their lawsuit. As the court recognized in *Reliance Insurance Co. v. Barron's*, 428 F. Supp. 200, 205 (S.D.N.Y. 1977), the practical impact of the order is to prevent petitioners from publishing any information about respondents, regardless of the source.[13]

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v. Washington Post Co., slip op. at 34-40, suggested that the government may safely ignore First Amendment considerations when it controls and dispenses information. Respondents echo this argument, when they argue that government can "attach any condition" to the discovery process (Resp. Br. 37). Yet if the First Amendment does not apply to the government, what remains of its purpose? "A free press cannot be made to rely solely upon the sufferance of government to supply it with information." *Smith v. Daily Mail*, 443 U.S. at 104.

[13] Contrary to respondents' argument (Resp. Br. 45) and the position taken by the Washington courts (JA 52a, 103a), petitioners have never argued that, as newspapers, they are entitled to

B. The Restriction Is Not Mandated by Compelling Governmental Interests.

As petitioners argued in their Brief (Pet. Br. 34-39), the speculative rationale adopted by the Washington courts is plainly insufficient to justify restrictions upon First Amendment rights. The state has an interest in facilitating pretrial discovery and in preventing discovery abuses, but that interest does not lead to the automatic conclusion that publicity is inherently evil or that it can never co-exist with the operation of pretrial discovery.

Respondents repeatedly invoke their freedom of religion, yet the state generally has "no legitimate interest" in limiting expression that might embarrass or annoy particular religious groups. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952). *See also Collin v. Smith*, 578 F.2d 1197, 1206 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978). The state's duty to promote respondents' religious freedom here is even less weighty. Despite Respondents' efforts to shift responsibility, it was not "[t]he State of Washington [that] has caused a collision" (Resp. Br. 25) of constitutional rights. Respondents, not the state, sought disclosure when they filed suit, alleging that petitioners caused the loss of members and contributors, asserting claims on behalf of all women members (JA 5a-6a, 9a-10a, 13a-14a), and challenging the newspapers' criticism of Rhinehart's financial practices. Rhinehart has no constitutional right to raise and lower his "cloak of confidentiality" (Resp. Br. 14) merely to suit his tactical convenience.

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preferential rights of access to the information at issue. The Protective Order, however, restricts publication, not access. As this Court noted in *Bigelow v. Virginia*, 421 U.S. 809, 828 (1975), governmental restrictions upon publication that are directed against a "publisher or editor of a newspaper . . . [incur] more serious First Amendment overtones" than they would otherwise. In preventing "use" of information lawfully acquired by a newspaper which is engaged in "using" information on a daily basis, the order reaches the heart of the editorial process. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. at 254-58.

Respondents' extensive discussion about their constitutional right of privacy is similarly misplaced. There is no indication that the information concerns "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education" which are protected by the constitutional right of privacy. *Paul v. Davis*, 424 U.S. 693, 713 (1976). Nor can respondents justifiably rely upon the "'right to be left alone,'" *Whalen v. Roe*, 429 U.S. 589, 599 n.25 (1977) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)), while they are simultaneously seeking to build a massive damage judgment upon the restricted information. They repeatedly confuse privacy torts with constitutional privacy.

Similarly, the state's interest in protecting respondents' associational rights is minimal where respondents themselves have made the allegedly "intrusive" (Resp. Br. 45-46) associational elements the focus of their lawsuit and a primary component of their case at trial. Even as they press their action, respondents remain free to associate with whomever they please, including the Foundation membership which, presumably, supports the lawsuit filed by their organization. Moreover, there can be no chilling effect upon the associational rights of the many *former* members, contributors, clients, and donors, who have cut their ties to the Aquarians. Indeed, in limiting their expression, the order facilitates Rhinehart's efforts (CP 335) to curtail the press and to silence disaffected former members. Should the Seattle Times receive information from these individuals which they wish to make public, Rhinehart has effectively secured their silence.[14]

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[14] Respondents' argument in support of their rights of religion, association, and privacy highlights several cases, which concern the right to confidentiality of membership lists in actions by government. As shown elsewhere, these cases do not support the broad premise for which respondents rely upon them. *See* footnote 5, *supra*. Moreover, the order prohibits petitioners from publishing information relating to former members, who may have no objection to

C. This Court Should Vacate the Order.

If this Court accepts respondents' invitation and tests the order against applicable First Amendment standards, it will conclude that the Protective Order does not satisfy the basic constitutional requirements articulated in this Court's prior decisions. Respondents do not explain how the order is "narrowly tailored" to serve a specific, compelling governmental need. *Press-Enterprise Co. v. Superior Court*, slip op. at 8 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)). Their discussion concentrates on narrow issues relating to the identity of Aquarian members or contributors but offers no precedent to support the broad ban upon discussion of respondents' "financial affairs" (JA 65a), which prevents the newspapers from discussing the allegedly deceptive acts and practices that respondents have made the focus of their lawsuit.

Other than giving the Court a rhetorical shrug that the normal processes of the law "are but pale palliatives" (Resp. Br. 29), respondents have made no showing that less restrictive measures could not mitigate any foreseeable problems that might arise from permitting freedom of expression. *See Press-Enterprise Co. v. Superior Court*, slip op. at 9; *Gulf Oil*, 452 U.S. at 104; *Nebraska Press*, 427 U.S. at 562. Respondents assert that the courts must order the newspapers not to publish any "pieces of private information" or disclose "closely guarded secrets." (Resp. Br. 33 n.10, 45.) Yet, should petitioners publish

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publicizing their experiences with the Aquarians. It also restricts petitioners' use of information about Foundation officials, who do not share the same rights of anonymity as the membership at large. Finally, the order broadly prohibits any discussion of respondents' "financial affairs" (JA 65a) derived from information which emerges during this lawsuit. None of the membership cases which respondents rely upon creates a constitutional right to maintain the secrecy of financial practices of an organization that solicits funds from the general public. *See Press-Enterprise Co. v. Superior Court*, slip op. at 11 (closure order should limit only "information that was actually sensitive and deserving of privacy protection").

information that is not newsworthy and unjustifiably give "publicity to a matter concerning the private life" of respondents and their financial backers, a damage remedy is readily available. *See Restatement (Second) of Torts* § 652D (1977). *See also id.* at § 652E. The random incidents collected in their affidavits do not lead to respondents' conclusion that they are an "oft-criticized and harassed church" (Resp. Br. 24 n.6), that the Seattle Times has demonstrated "consistent callous disregard" for their safety (Resp. Br. 29), or that their predicted martyrdom is even remotely imminent.

Finally, respondents fail to demonstrate either the harm dissemination poses or how the order effectively averts it. *See Smith v. Daily Mail*, 443 U.S. at 105; *Nebraska Press*, 427 U.S. at 562. The courts below are also silent on this issue. Respondents concede, and the Washington courts agreed, that when offered as evidence to support or contradict respondents' claims, the information covered by the order "will then be a matter of public record and available for publication." (JA 131a.) If, as respondents acknowledge, the order has no lasting impact, it cannot guarantee access to the courts unaccompanied by public scrutiny or promote constitutional rights of religion, association, or privacy.

Is there then any compelling interest that could justify a temporary ban upon publication of factual information that is almost certain to become public? If publicity *per se* is evil, as respondents imply, then proceeding to trial or summary judgment might well provoke incidents similar to those they complain of in their affidavits. Yet if the order provides no meaningful protection in this regard, it serves no purpose and should not have been entered at the expense of petitioners' First Amendment rights.

CONCLUSION

Petitioners do not ask that their First Amendment rights be granted primacy over other constitutional interests. Nor do they ask for an absolute right to print anything they learn about Rhinehart and his organization. They ask only that the Washington courts give their First Amendment rights substantial weight before issuing an order which prohibits them from publishing or discussing factual information which emerges during the course of litigation. Justice should be presumptively open, not secret as respondents would prefer. Petitioners respectfully request that the judgment and opinion of the Washington Supreme Court be vacated and the cause remanded for further proceedings.

Respectfully submitted,

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